Single Bench

IN THE HIGH COURT OF JUDICATURE AT, BILASPUR

CRIMINAL APPEAL NO 197 /2006 (S.B.)

APPELLANTS: - In Jail

1. **UMESH KUMAR SAHU** S/O Bhadooram Aged About 21Yrs.Resident of, Village Kundel, P.S. Magarload, Distt. Dhamtari.Residing At Present, Shantinagar Raipur. (C.G.)
2. **USMAN KHAN** s/o Mustafa Khan, Aged About 27 Yrs. Near Water Tank, Lakhenagar, Distt. Raipur. (C.G.)
3. **DANKESH SINGH** S/o Gunjmarak Singh, Aged About 27 Yrs. Resident Of Hanuman Nagar (Lakhe Nagar)Raipur. P.S. Purani Basti Raipur (C.G.)

(1240/06

Filed on 20/2/06

by Shri B. U. Sahu

Spl 31.05

VERSUS

RESPONDENT: - **STATE OF CHHATTISGARH** Through, Station house officer Police-Station-TongpalDistt. Dantewada [C.G.].

CRIMINAL APPEAL UNDER SECTION 36 (B) of N.D.P.S. Act R/W Sec. 374 (2) OF THE CODE OF CRIMINAL PROCEDURE.

(18)

A.F.R.
10.5.06

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 197/2006

Umesh Kumar Sahu & Others

Vs.

State of Chhattisgarh

Post for Judgment : 10.05.2006

Sd-/
Dilip Raosaheb Deshmukh
Judge

(19)

A.F.R.

10.5.06

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 197/2006

Umesh Kumar Sahu & Others

Vs.

State of Chhattisgarh.

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Present:

Shri Prakash Tiwari, learned counsel with Shri Avinash Kumar Mishra, learned counsel for the appellants
Shri Ashish Shukla, G.A. for the State.

J U D G M E N T

(Delivered on 10th day of May, 2006)

This appeal is directed against the judgment dated 6.2.2006 delivered by Shri T.K. Jha, Special Judge, Dantewada in Sessions Trial No. 4/2005 whereby the appellants were convicted under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and were sentenced to undergo rigorous imprisonment for 10 years and a fine of Rs.1,00,000/- and in default of the same, to undergo additional S.I. for 1 year.

2. Brief facts of the case are that on 9.10.2005, upon receiving secret information that contraband ganja was being transported from Sukma to Jagdalpur in a Qualis vehicle bearing No. CG-04/B/2126 Shri G.N. Singh, P.W. 5 Station House Officer, P.S. Tongpal, Distt. Dantewada reduced the secret information to writing and after informing his senior officials, intercepted the above mentioned vehicle

in front of P.S. Tongpal, Dustt. Dantewada. The appellant Umesh Kumar Sahu was driving the Qualis and the other co-accused appellants were seated inside. After completion of the necessary legal formalities, search was conducted and total quantity of ganja 98 kgs. in 4 packets was seized from the possession of the appellants vide seizure memo Ex.P-12. Two samples of 25 gms. each were taken out from each packet and sealed vide Ex.P-10. The 4 packets containing ganja and the 8 sample packets and also the Qualis vehicle bearing No. CG-04/B/2126 were entrusted for safe custody at the Malkhana of P.S. Tongpal to Head Constable C. Tigga P.W. 1 who made an entry thereof in the Malkhana Register vide Ex.P-1 (c). On 11.2.2005, 4 sample packets of ganja marked A-1, B-1, C-1 and D-1 were sent for chemical analysis to the FSL vide memo of the Superintendent of Police Ex.P-31 through constable Soman Markam No. 505. These 4 sample packets were delivered by Constable Soman Markam No. 505 at the FSL, Raipur on 14.2.2005 vide acknowledgment dated 28.6.2005 Ex.P-32. Vide report Ex.P-34, the F.S.L confirmed that all the sample packets contained ganja. After completion of investigation, the appellants were prosecuted under Section 20 (b) (ii) (c) of the Act.

3. The appellants abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 5 witnesses. The learned trial Judge relying upon the sole testimony of Sub Inspector G.N. Singh P.W. 5 convicted and sentenced the appellants as aforesaid in para 1.

4. Shri Prakash Tiwari, learned counsel for the appellants has argued that the independent witnesses Anil Pandey P.W. 2 and Bhagat Sethia P.W. 3 did not support the testimony of Sub Inspector G.N.

Singh P.W.5. There was no evidence to show that the ganja was seized from the conscious possession of the appellants. A joint seizure memo Ex.P-12 was prepared by Sub Inspector G.N. Singh whereas the evidence of Sub-Inspector G. N. Singh did not show that each of the appellant was seated in the Qualis vehicle in conscious possession of the contraband ganja. The testimony of Head Constable C. Tigga P.W. 1 was also referred to while arguing that it is extremely doubtful that Sub Inspector G.N. Singh P.W. 4 had sealed the sample packets in the presence of the appellants at the time of affecting the seizure. Ex.P-12 seizure memo was also referred while arguing that it was mentioned therein that the entire 4 bags of ganja as also the 8 sample packets were sealed at 1.50 p.m. whereas the weighment panchnama showed that the sample packets were sealed at 1.00 p.m. The testimony of head constable C. Tigga P.W. 1 created a serious doubt that till depositing the entire quantity of seized ganja in 4 bags at the Malkhana, Shri G.N. Singh had not taken any samples therefrom. Lastly, it was argued that the possibility that sample packets examined by the F.S.L were tampered with, could not be ruled out because the constable to whom the sample packets were entrusted on 11.2.2005 by memo Ex.P-31 of the Superintendent of Police was not examined to explained the reason for the delay in delivering the samples at the FSL on 14.2.2005. It was also pointed out that the copy of the Malkhana Register Ex.P-1 (c) did not show that any identifying marks were put on the sample packets. It was also shown that the impression of the seal was also not deposited along with the seized substance and the sealed sample packets at the Malkhana. Therefore, the mention of identifying marks A-1, B-1, C-1 and D-1 to be found on the sample packets vide memo Ex.P-31 of the Superintendent of Police, Dantewada did not rule out the possibility

that the samples had been tampered with. On these grounds, it was prayed that the conviction of the appellants and the sentence awarded by the learned trial Judge was liable to be set aside.

5. On the other hand, Shri Ashish Shukla, learned Government Advocate placed reliance on *Madan Lal and Another Vs. State of Himachal Pradesh* reported in AIR 2003 Supreme Court 3642 while arguing that the testimony of Sub Inspector G.N. Singh clearly establishes that the appellants knew about the transportation of contraband ganja and were travelling together in the Qualis vehicle. Therefore, conscious possession of each appellant over the quantity of ganja seized was established. Reliance was also placed on *Harpit Singh Anand Vs. State of West Bengal* 2003 (4) Crimes 390 (SC) while arguing that the mere fact that Anil Pandey P.W. 2 and Bhagat Sethia P.W. 3 had turned hostile was not sufficient to discard the testimony of Sub Inspector G.N. Singh.

6. Having considered the rival submission, I have perused the record. An offence under Section 20 (b) (ii) (c) of the Act entails very severe and harsh punishment. It is, therefore, obligatory on the prosecution to prove by leading legal, reliable and cogent evidence that from the quantity of ganja seized, samples were taken in presence of the appellants, were sealed in their presence and were deposited in the Malkhana of the concerned P.S. without undue delay. It is also necessary for the prosecution to establish that from the time of seizure and sealing of the contraband ganja as also the samples taken therefrom to the time when the sample packets

reached the FSL, there was no possibility of tampering with the samples.

7. The record of the lower Court shows that the 4 bags containing Contraband ganja or the 4 sample packets retained at the Malkhana and the 4 sample packets returned by the F.S.L were not produced before the trial Court so as to facilitate a comparison of the seals affixed on the sample packets before they were sent for examination to the F.S.L. In the present case, it is also not disputed that the specimen impression of the seal used to seal sample packets was not separately sent along with sample packets to the F.S.L. The specimen impression of the seal on seizure memo Ex.P-12 is wholly ineligible and does not match with the description of the seal shown on the report of the F.S.L Ex.P-34. The testimony of Head Constable C. Tigga clearly shows that no samples were taken on the spot from the 4 packets of contraband ganja by Sub Inspector G.N. Singh. It also shows total non- compliance of Section 55 of the Act since the Head Constable and not the S.H.O. of P.S. Tongpal had separated and sealed the samples from the 4 bags of contraband ganja before it was kept at the Malkhana.

8. The seizure memo Ex.P-12 mentions that at 1.50 p.m., the 4 bags containing 98 kgs ganja were seized and sealed and also shows that two samples of 25 gms each from each packet were prepared separately and sealed, meaning thereby that total number of 8 samples of 25 gms each were prepared at the time of affecting the seizure memo. However it is borne out from the weighment Panchnama Ex.P-10 that the samples were prepared and sealed at 1 p.m. which creates a doubt. No specimen impression of the seal was affixed on the weighment panchnama. The testimony of C. Tigga

P.W. 1. that after the entire contraband ganja contained in 4 bags was deposited in the Malkhana, he had lifted only 2 samples out of the entire quantity of contraband ganja and had sealed those 2 sample packets at the Malkhana itself wholly contradicts the testimony of Sub Inspector G.N. Singh. He also admits that after the entire quantity of contraband ganja was deposited in Malkhana, it was ascertained by weighment as to how much quantity is contained in each bag. This completely demolishes the testimony of Sub Inspector G.N. Singh that he had got the entire quantity weighed after affecting its seizure and had taken 2 samples of 25 gms each from each packet and had affixed his seal on the sample packet in presence of the appellant. The testimony of Head Constable C. Tigga P.W. 1 creates a serious dent in the prosecution story and renders the testimony of Sub Inspector G.N. Singh wholly unworthy of credit.

9. It has also not been explained by the prosecution as to how the identifying marks A-1, B-1, C-1 and D-1 were to be found on the sealed packets while they were sent for chemical analysis to the FSL. The seizure memo Ex.P-12 or Malkhana Register Ex.P-1 (c) does not disclose any such identifying marks on the sample packets. The memo of the Superintendent of Police Ex.P-31 also shows that the sample packets were sent through Constable Soman Markam No. 505 for chemical analysis to the FSL on 11.2.2005. The Malkhana Register Ex.P-1 (c) does not show any such entry that the sample packets were taken out on 11.2.2005 from the Malkhana and were sent for chemical analysis to the FSL through Constable Soman Markam. The prosecution also did not examine Constable Soman Markam who alone could have explained the delay in delivering the samples at F.S.L. Raipur on 14.2.2005 and could have explained as to where the sample

packets were kept from 11.2.2005 to 14.2.2005. This lacuna also creates doubt in the prosecution story and does not rule out the possibility that the sample packets sent for chemical examination to the FSL had been tampered with.

10. Independent witness Anil Pandey P.W. 2 and Bhagat Sethia P.W. 3 have not supported the prosecution story in any manner. Nothing has been elicited in cross-examination to show that their testimony was false that at the behest of the Police, they had simply put their signatures on the documents of seizure of the contraband ganja. Both have admitted that their signatures were taken at 7-8 p.m. at P.S. Tongpal. In the facts and circumstances mentioned above, this also renders the testimony of Sub Inspector G.N. Singh P.W. 5 doubtful. So far as the case of *P.P. Fatima Vs. State of kerala* **2003 (4) Crimes 390 (SC)** is concerned, in the facts and circumstances of the case, it does not help the prosecution in view of the material omissions and contradictions in the testimony of Sub Inspector G.N. Singh and Head Constable C. Tigga. The testimony of Sub-Inspector G.N. Singh that he had taken 2 samples of 25 gms each from each bag containing contraband ganja on the spot is thus rendered unworthy of credit.

11. The testimony of Sub Inspector G.N. Singh P.W. 5 also does not show as to where the contraband ganja contained in 4 bags was kept in the Qualis vehicle. In para 4 of his testimony, he also does not mention that the 4 bags of contraband ganja was being transported by the appellants in a Qualis vehicle or that the appellant Umesh Kumar Sahu was driving the vehicle and that the other co-accused were seated in the vehicle. In absence of any such evidence, it is difficult to hold that the appellants were transporting 98 K.G. of contraband ganja in 4 bags in the Qualis vehicle bearing No. CG-04/B/2126. No

mention of the Qualis vehicle bearing No. CG-04/B/2126 is to be found in the entire testimony of Sub Inspector G.N. Singh. The case of *Madan Lal and Another Vs. State of Himachal Pradesh* **AIR 2003 Supreme Court 3642** cited by the learned Govt. Advocate does not therefore, help the prosecution in any manner.

12. Having thus considered the evidence led by the prosecution in its entirety, the following points emerge:

A/ There is no evidence to show that 98 kgs of ganja was being transported by the appellants in Qualis vehicle No.CG-04/B/2126 so as to draw an inference that the appellants were in conscious possession thereof.

B/ The testimony of Head Constable C. Tigga P.W. 1 renders the testimony of Sub Inspector G.N. Singh wholly unworthy of credit.

C/ No explanation is forthcoming as to any delay in reaching the sample packet to the F.S.L. Non examination of Constable Soman Markam also creates a serious dent in the prosecution story.

D/ The property in the case i.e. 4 bags containing contraband ganja and the 4 sample packets which were received from the F.S.L after the chemical examination and the 4 sample packets retained at Malkhana were not produced before the trial Court.

E/ Independent witnesses Anil Pandey, P.W. 2 and Bhagat Sethia P.W. 3 did not support the prosecution story.

F/ The possibility that the sample packets examined by the F.S.L could have been tampered with could not be ruled out.

13. For the foregoing reasons, conviction of the appellants under Section 20 (b) (ii) (C) of the Act and the sentence awarded thereunder are liable to be set aside.

14. In the result, the appeal is allowed. Conviction of the appellant under Section 20(b)(ii)(C) of the Act and the sentence awarded thereunder are set aside. The appellants are acquitted and shall be set at liberty forthwith, if not required in any other case.

Sd-/
Dilip Raosaheb Deshmukh
Judge

Priya